UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

California Independent System Operator Corporation	))	Docket No. ER01-889-000

CALIFORNIA ELECTRICITY OVERSIGHT BOARD'S REQUEST FOR REHEARING OF THE APRIL 6, 2001 "ORDER GRANTING MOTION"

Pursuant to Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713 (2000), and Section 313 of the Federal Power Act, 16 U.S.C. § 8251, the California Electricity Oversight Board (CEOB) hereby requests rehearing of the Commission's April 6, 2001 *Order Granting Motion,* 95 FERC ¶ 61,024 (2001) (April 6 Order). The April 6 Order is arbitrary and capricious and an abuse of discretion.

I. SPECIFICATION OF ERROR

The April 6 Order is in error in the following respects:

1. It is inconsistent with the Commission's February 14, 2001 *Order Addressing Creditworthiness Tariff Provisions Proposed By the California Independent System Operator and California Power Exchange,* 94 FERC ¶ 61,132 (2001) (February 14 Order).
2. It is not the result of reasoned decision-making.
3. The April 6 Order would require the CAISO tariff to be changed in a way that the CAISO has not proposed, and that is inconsistent with the tariff as

a whole, and which could only be accomplished in the context of a § 206 proceeding.

II. BACKGROUND

In response to the lowered credit ratings of Southern California Edison (SCE) and Pacific Gas and Electric Company (PG&E), the demise of the California Power Exchange, and in light of its responsibility to ensure system reliability, the California Independent System Operator (CAISO) filed proposed Amendment No. 36 to the CAISO tariff on January 5, 2001. In that filing, the CAISO proposed to waive, on a temporary basis, the creditworthiness provisions of Section 2.2.3.2 of the CAISO's tariff insofar as they applied to SCE and PG&E.

Under Section 2.2.3.2 of the tariff (prior to the proposed amendment), market participants are required to maintain an approved credit rating or, alternatively, to provide a form of security acceptable to the CAISO. Any market participant that fails to meet the requirements of Section 2.2.3.2 "shall be subject to the limitations on trading set out in Section 2.2.7.3." Pursuant to Section 2.2.7.3, any market participant that fails to satisfy the credit or security requirements of Section 2.2.3.2 "shall not be entitled to submit a schedule to the ISO and the ISO may reject any Schedule submitted . . . ." Thus, in the absence of a relaxation of the creditworthiness requirements of Section 2.2.3.2, SCE and PG&E would not have been able to submit schedules to serve their load.

In its February 14 Order, the Commission accepted Amendment No. 36 insofar as it allowed SCE and PG&E to submit schedules consisting of their own resources, including those under contract, balanced against native load. However, the Commission rejected Amendment No. 36 insofar as it would have applied to "third party transactions"

unless "combined with appropriate support from credit worthy counterparties . . . for that portion of the power that is not self-supplied . . ." February 14 Order at 61,510. The February 14 Order expressly left "***unresolved*** the creditworthiness issues [that] relate to the UDC's [i.e. utilities'] residual load that is served through the ISO's imbalance energy market." *Id*. at 61,511 (emphasis added). The February 14 Order is, thus, consistent with the structure of the tariff, and, specifically, with Sections 2.2.3.2 and 2.2.7.3. That is, the creditworthiness requirement applies to the submission of schedules, which occurs in the day-ahead or hour-ahead of real-time. Any residual load that is not balanced with scheduled energy, is served through the CAISO's imbalance energy market, i.e. the "real-time" energy market and through out-of-market or emergency dispatch orders in the event of bid insufficiency in the CAISO's real-time imbalance energy market. Neither Amendment No. 36 nor the February 14 Order would affect the operation of the CAISO's real-time imbalance energy market or the CAISO's emergency dispatch protocols.

On March 1, 2001, the CAISO submitted its compliance filing. The compliance filing amended Section 2.2.3.2 to reflect that SCE and PG&E would be exempt from the creditworthiness requirements under three circumstances: (1) scheduling owned resources; (2) scheduling resources under contract; and (3) scheduling a "resource from which another entity has purchased Energy or with regard to which another entity has provided assurance of payment for Energy . . . ."

On February 22, 2001, a group of California generators and marketers filed a motion to require the CAISO to "comply" with the February 14 Order. According to these California generators, the February 14 Order applies to both the real-time market and to the CAISO's emergency dispatch orders. In its April 6, 2001 Order Granting

Motion, the Commission stated that the CAISO "had misinterpreted" the February 14 Order explaining that the order "did not exempt any transactions from the requirement to have in place a creditworthy buyer for all energy delivered to loads through the ISO." April 6 Order, *slip op*. at 4.

III. ARGUMENT

A. The April 6 Order Is Inconsistent With The February 14 Order

An administrative agency is generally obliged to act consistently with its own prior orders and decisions. *See, e.g., ANR Pipeline Co. v. Federal Energy Reg. Comm'n*, 71 F.3d 897, 901 (D.C. Cir. 1995) ("where an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious"). The April 6 Order is clearly inconsistent with the February 14 Order.

As discussed above, the February 14 Order expressly did not decide the creditworthiness issue as applied to the real-time market or with respect to emergency dispatch orders. Moreover, as noted in Judge Damrell's April 9, 2001 Order in *California Independent System Operator Corp. v. Reliant Energy Services, et al.*, No. Civ. S-01-238 (E.D. Cal. 2001),[1] attached hereto as Exhibit A,[2] the Commission "expressly acknowledged this fact . . . in a brief submitted to the Ninth Circuit." *Id.* at 1 ((("The [FERC] stated in its February 14, 2001 order that it would address the applicability of the creditworthiness provision to emergency dispatch instructions *in a future order,* and the matter is *currently* under consideration by the [FERC].") quoting the

[1] Judge Damrell had issued several early orders, including an Order Granting Preliminary Injection issued on March 21, 2001, requiring generators to comply with the CAISO's emergency dispatch instructions regardless of whether the CAISO had lined-up a creditworthy purchaser or guarantor.

[2] The CEOB requests that the Commission take judicial notice of Judge Damrell's Order pursuant to Rules 212 and 50b(d) of the Commission's Rules of Practice and Procedure.

Commission's Memorandum in Response to April 3 Order at 8, Appeal No. 01-15528, filed April 4, 2001 (emphasis added by the District Court)). Thus, it came as something of a surprise to Judge Damrell when the Commission stated in its April 6 Order that it had "*already decided* the applicability of the creditworthiness provisions to emergency dispatch instructions in its February 14, Order. Specifically, the FERC's current position is that 'the February 14 Order did not exempt *any* transactions from the requirement to have in place a creditworthy buyer.'" *Id*. at 2-3 (emphasis added by the District Court).[3]

B. The Commission Offers No Reasoned Basis For Departing From Its Prior Order

An agency may not depart from existing precedent without providing a reasoned based for so doing. *ANR Pipeline,* 71 F.3d at 901. The April 6 Order provides no explanation, reasoned or otherwise, for its change of course. The April 6 Order simply states, in direct contradiction with the February 14 Order, that the Commission had already decided something it had plainly not decided. If the Commission wanted reconsider its February 14 Order, it should have done so in an order on rehearing in which it explained its change of course.[4]

Both of the Commission's orders do reflect a common concern—that suppliers have a reasonable expectation of being paid for producing electricity. The CEOB understands this concern and agrees that suppliers are entitled to be paid (at just and reasonable rates). The CAISO's first and primary concern, however, is to keep the lights on, and to keep the lights on requires the CAISO to balance demand and supply in real-

[3] The April 6 Order also came as a surprise to the CEOB. The CEOB would have filed a request for rehearing of the February 14 Order if the February 14 Order had in fact extended to the real-time imbalance energy market and to emergency dispatch protocols.

time, for the benefit of the entire system. The CAISO must have the ability to call on resources in the imbalance market and, in the event supply in the imbalance market is insufficient, issue emergency dispatch orders to keep the system going. During these conditions, the first order of business is to keep the lights on.

C. The April 6 Order Would Require The CAISO Tariff To Be Changed In A Way That The CAISO Has Not Proposed, And That Is Inconsistent With The Tariff As A Whole, And Which Could Only Be Accomplished In The Context Of A § 206 Proceeding

As the discussion above demonstrates, modification of the CAISO tariff to implement the April 6 Order would introduce a new requirement as there is no CAISO tariff provision that applies creditworthiness standards to real-time transactions or emergency dispatch orders. The CAISO's Amendment No. 36 would have relaxed the existing standards; the February 14 Order allowed for a more limited relaxation; and the April 6 Order imposed a new requirement. Moreover, the April 6 Order would appear to allow generators the discretion not to comply with an emergency dispatch order in the absence of a creditworthy purchaser. This would gut § 5.1.3 of the CAISO tariff, which requires that Participating Generators comply with emergency dispatch orders. For these reasons, it is clear that the April 6 Order required modifications that exceed the scope this § 205 proceeding and could only by directed in the context of a § 206. proceeding.

[4] If the Commission had issued an order on rehearing, the matter would now be ripe for judicial review. As such, judicial may de delayed indefinitely in violation of parties' due process rights.

IV. CONCLUSION

For the foregoing reasons, the CEOB respectfully requests that the Commission grant this request for rehearing.

Dated: May 4, 2001

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary for this proceeding on May 4, 2001.

Dated at Sacramento, California, this 4th day of April 2001.

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